

# **Report on Emerging Technology and Electronic Banking submitted by the staff of the Indiana Department of Financial Institutions November 1, 2005**

## **Introduction**

The Indiana Department of Financial Institutions (“Department”) staff presents this report pursuant to legislation enacted by the Indiana General Assembly during the 2005 regular session. Specifically, Section 29 of House Enrolled Act 1179 directed the Department, in consultation with appropriate industry association and other interested parties, to consider appropriate language for proposed legislation intended to modernize IC 28 to incorporate provisions concerning emerging technology and electronic banking.

The Department staff met with representatives of the Indiana Bankers Association, Community Bankers Association of Indiana, and the Indiana Credit Union League to discuss proposed legislation concerning emerging technology and electronic banking. The staff circulated the proposed legislation to appropriate parties for review and comment prior to the submission of this report.

The Conference of State Bank Supervisors (“CSBS”) prepared a memorandum<sup>1</sup> dated May 9, 2003, regarding electronic banking rules and regulations. The Department staff participated in the development of the CSBS memorandum, and used the memorandum as a starting point for the development of proposed legislation.

The three key objectives defined for the proposed legislation are as follows:

1. Provide guidance to Indiana financial institutions on emerging technology and electronic banking by identifying permissible activities.
2. Define the factors that the Department will consider when authorizing additional allowable electronic banking activities.
3. Clarify for Indiana financial institutions that powers and responsibilities historically exercised through non-electronic means may be conducted electronically.

## **Identification of Permissible Activities**

In May of 2002, the Office of the Comptroller of the Currency (“OCC”) issued its final rule on electronic activities of national banks.<sup>2</sup> Subpart E of 12 CFR 7.5 of the final rule specifically authorizes various electronic activities and products for national banks. Part

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<sup>1</sup> Attached as appendix #1

<sup>2</sup> 67 FR 34992 (May 17, 2002)

721 of the National Credit Union Administration Rules and Regulations authorizes similar electronic activities and products for federal credit unions. The proposed legislation incorporates these federal references for the respective State charter types to ensure that Indiana financial institutions are operating with powers that are consistent with their federal counterparts.

### **Authorization of additional electronic banking activities**

Technology evolves in a way that makes it very difficult to identify or define all of the potential activities in which a financial institution may want to engage. Therefore, the proposed legislation creates a mechanism for the Director of the Department to evaluate a proposed electronic banking activity or power and make a determination that it is permissible for Indiana financial institutions.

In making a determination, the Director is required to consider if the electronic activity:

1. is the functional equivalent to, or a logical outgrowth of, a recognized financial institution activity;
2. strengthens the financial institution by benefiting its customers or its business; and
3. involves risks similar in nature to those already assumed by financial institutions.

The inclusion of this provision into the Indiana Code will provide a mechanism for Indiana-chartered financial Institutions to continue to increase electronic capabilities and provide customers with more efficient and convenient electronic delivery channels for financial information and products.

### **Proposed Legislation**

#### **28-1-11-3.3**

(a) This section applies to a bank's use of electronic technology to deliver services and products consistent with:

- (i) existing safety and soundness standards;
- (ii) existing consumer protection guidance; and
- (iii) state or federal supervisory guidance deemed necessary or appropriate by the Director.

(b) This section identifies the criteria that the Director shall use to determine whether an electronic activity is authorized as part of, or incidental to, the business of banking under existing statutory authority.

(c) The Director may determine that activities are permissible for Indiana-chartered banks under existing statutory authority. The Director may establish standards or

conditions designed to ensure that the activities are transacted as intended and are conducted safely and soundly, in accordance with other applicable statutes, regulations, or supervisory policies.

(d) (1) An activity is authorized for Indiana-chartered banks as part of the business of banking if the activity is described in existing statutory authority. In determining if an electronic activity is part of the business of banking, the Director shall consider whether the activity:

- (i) is the functional equivalent to, or a logical outgrowth of, a recognized banking activity;
- (ii) strengthens the bank by benefiting its customers or its business; and
- (iii) involves risks similar in nature to those already assumed by banks.

(2) In determining if an electronic activity is part of the business of banking, the Director may consider whether the activity may be conducted by:

- (i) national banks,
- (ii) federal savings associations,
- (iii) federal credit unions; or
- (iv) banks, organized under the laws of another state, that conduct business in Indiana,
- (v) and, satisfies the factors listed in (d) (1) (i), (ii) and (iii).

(e) (1) An electronic banking activity is authorized for an Indiana-chartered bank as incidental to the business of banking if it is convenient or useful to an activity that is specifically authorized for Indiana-chartered banks or to an activity, which is otherwise part of the business of banking. In determining whether an activity is incidental to the business of banking, the Director may consider but is not limited to the following factors in determining whether the activity:

- (i) facilitates the production or delivery of a bank's products or services,
- (ii) enhances the bank's ability to sell or market its products or services,
- (iii) improves the effectiveness or efficiency of the bank's operations; or
- (iv) enables the bank to use capacity acquired for its banking operations or otherwise avoid economic loss or waste.

#### **28-1-11-3.4**

(a) The Indiana-chartered bank's board of directors and executive officers are responsible for ensuring all potential risks (e.g. reputation, legal, compliance, and transaction) are evaluated and taken into account when implementing any electronic services. Their responsibility cannot be delegated to others within the institution or to outside parties.

(b) After its board of directors and executive officers have conducted a thorough review of the potential risks and liabilities associated with any electronic services, an Indiana-

chartered bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver, subject to IC 28-1-11-3.3.

(c) An Indiana-chartered bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that a national bank is specifically authorized to perform, provide or deliver in accordance with Subpart E of 12 CFR 7.5.

(d) (1) Subject to the approval of the customer, an Indiana-chartered bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized or required to perform, provide, or deliver by non-electronic means or facilities.

(2) When an Indiana-chartered bank performs, provides, or delivers through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver, the electronic activity is subject to the safety and soundness and compliance regulatory requirements and supervisory guidance that the Director would apply if the activity were conducted by non-electronic means or facilities.

### **IC 28-7-1-9.3**

(a) This chapter applies to a credit union's use of electronic technology to deliver services and products consistent with:

- (i) existing safety and soundness standards;
- (ii) existing consumer protection guidance; and
- (iii) state or federal supervisory guidance deemed necessary or appropriate by the Director.

(b) This section identifies the criteria that the Director shall use to determine whether an electronic activity is authorized as part of, or incidental to, the business of credit unions under existing statutory authority.

(c) The Director may determine that activities are permissible for Indiana-chartered credit unions under existing statutory authority. The Director may establish standards or conditions designed to ensure that the activities are transacted as intended and are conducted safely and soundly, in accordance with other applicable statutes, regulations, or supervisory policies.

(d)(1) An activity is authorized for Indiana-chartered credit unions as part of the business of credit unions if the activity is described in existing statutory authority. In determining if an electronic activity is part of the business of credit unions, the Director shall consider whether the activity:

- (i) is the functional equivalent to, or a logical outgrowth of, a recognized credit union activity;

- (ii) strengthens the credit union by benefiting its members or its business; and
- (iii) involves risks similar in nature to those already assumed by credit unions.

(2) In determining if an electronic activity is part of the business of credit unions, the Director may consider whether the activity may be conducted by:

- (i) federal credit unions,
- (ii) national banks,
- (iii) federal savings associations, or
- (iv) credit unions, organized under the laws of another state, that conduct business in Indiana;
- (v) and, satisfies the factors listed in (d) (1) (i), (ii) and (iii).

(e)(1) An electronic credit union activity is authorized for an Indiana-chartered credit union as incidental to the business of credit unions if it is convenient or useful to an activity that is specifically authorized for Indiana-chartered credit unions or to an activity, which is otherwise part of the business of credit unions. In determining whether an activity is incidental to the business of credit unions, the Director may consider but is not limited to the following factors in determining whether the activity:

- (i) facilitates the production or delivery of a credit union's products or services,
- (ii) enhances the credit union's ability to sell or market its products or services,
- (iii) improves the effectiveness or efficiency of the credit union's operations;
- or
- (v) enables the credit union to use capacity acquired for its credit union operations or otherwise avoid economic loss or waste.

#### **IC 28-7-1-9.4**

(a) The Indiana-chartered credit union's board of directors and executive officers are responsible for ensuring all potential risks (e.g. reputation, legal, compliance, and transaction) are evaluated and taken into account when implementing any electronic services. Their responsibility cannot be delegated to others within the institution or to outside parties.

(b) After its board of directors and executive officers have conducted a thorough review of the potential risks and liabilities associated with any electronic services, an Indiana-chartered credit union may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver, subject to IC 28-7-1-9.3

(c) An Indiana-chartered credit union may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that a federal Credit Union is specifically authorized to perform, provide or deliver in accordance with part 721 of the National Credit Union Administrations Rules & Regulations.

(d) (1) Subject to the approval of the member, an Indiana-chartered credit union may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized or required to perform, provide, or deliver by non-electronic means or facilities.

(2) When an Indiana-chartered credit union performs, provides, or delivers through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver, the electronic activity is subject to the safety and soundness and compliance regulatory requirements and supervisory guidance that the Director would apply if the activity were conducted by non-electronic means or facilities.

### **Language for Savings Banks and Savings Associations**

The proposed provisions of IC 28-1-11-3.3 and 28-1-11-3.4 should be applied to Savings Banks operating under IC 28-6 and Savings Associations operating under 28-15. Both types of institutions currently enjoy the same powers as a bank and conforming amendments to Articles 6 and 15 of Title 28 should be made in order to maintain consistency among the charter types.

## **Appendix #1**



### **MEMORANDUM**

To: State Bank Supervisors

From: Joseph A. Smith, Jr., Commissioner, NC Banking Department, CSBS  
Internet Banking Taskforce Chairman

Date: May 9, 2003

Re: Three-Tier Approach to State Electronic Banking Rules and Regulations

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While electronic banking is not new, there are certain dimensions and characteristics that present new challenges for both bankers and supervisory agencies. As the banking industry continues to increase its capabilities to provide customers with an efficient and convenient electronic delivery channel for banking information and products, electronic banking has continued to emerge in the “brick and mortar” segment of the industry in the form of telephone banking, PC banking, and Internet banking.

As banking institutions experiment and innovate in order to identify the right product/service mix to support their web-driven banking operations, the Conference of State Bank Supervisors (CSBS) in conjunction with the Internet Banking Task Force have prepared the following three-tiered strategy to aid State Supervisors as they review applications to establish Internet banks and more broadly, to assist Supervisors in evaluating and responding to the key risk areas associated with the electronic banking activities of all banks.

In May 2002, the Office of the Comptroller of the Currency (OCC) issued its final rule on electronic activities (Subpart E) of national banks.<sup>3</sup> Subpart E was implemented by the OCC following issuance of an Advance Notice of Proposed Rulemaking in February 2000<sup>4</sup> (ANPR), and a Notice of Proposed Rulemaking in July 2001<sup>5</sup> (NPR).

Structurally, Subpart E collected existing OCC authorizations related to electronic provision of various activities and products by national banks, and the factors or analysis relied on by the OCC in evaluating proposed activities. The alternatives discussed in this

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<sup>3</sup> 67 FR 34992 (May 17, 2002).

<sup>4</sup> 65 FR 4895 (February 2, 2000).

<sup>5</sup> 66 FR 34855 (July 2, 2001).

memorandum are intended to make available to state banks a range of electronic activities based on the entire set of activities available to national banks under Subpart E.

## **Introduction**

In light of the diverse membership of the CSBS, as well as the a range of ability and willingness to engage in wholesale revisions of existing state law within the CSBS member ranks, this memorandum describes three alternatives by which state banking departments could choose to amend the current regulatory framework faced by a state bank interested in engaging in a wide range of electronic activities.

Tier 1 requires no amendment of existing statutory law, relying instead on broadened interpretation of existing parity statutes, broadened or initial interpretation of existing regulations, and adoption of new regulations within the authority of the state banking commissioner. You will need to consider whether there is sufficient flexibility under your respective parity authority to effectively adopt the OCC's Subpart E in that manner, rather than through adoption of a model state law on the subject. Tier 2 incorporates Tier 1 and suggests limited amendments to provisions of existing state law. Tier 3 envisions adoption of all or part of a model rule or law (model) which includes the provisions addressed below.

## **Tier 1 –Parity Statutes / Regulatory Interpretations**

The underlying premise of the Tier 1 approach is that amendment of existing statutes, and adoption of new statutes, is not possible or desirable. To that end, the Internet Banking Task Force has undertaken a discussion of a number of alternatives.

### **A. Parity Statutes**

Many CSBS member states have adopted some form of a so-called parity statute, designed to maintain some level of consistency between powers and allowable activities of national banks and federal savings associations, as determined by the OCC and the OTS, and those of the respective states' banks as determined by the their legislature and the commissioner.

States acting under Tier 1 should undertake an analysis of the existing parity statute to determine whether the language of the statute, as interpreted to date by state courts and banking regulators, is broad enough to allow the commissioner to take action to allow state-chartered banks to engage in activities allowable for national banks under Subpart E. Following completion of the necessary legal analysis and promulgation of the parity statute's required regulatory finding or process<sup>6</sup>, the development of regulations, as appropriate and necessary, for

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<sup>6</sup> For example, California Financial Code Section 753 provides that after a finding by the commissioner that "...any provision of federal law [the United States Constitution, any federal statute, any federal court decision, and any regulation, circular, bulleting, interpretation, decision, order, and waiver issued by a federal agency] applicable to national banking associations doing business in this state is substantively different from the provisions of the [Financial Code] of this state ..." the commissioner can



supervising the expanded electronic activities of state-chartered institutions should be undertaken.

## **B. Broadened Regulatory Interpretations**

Re-examination of existing regulatory interpretations covering a wide range of activities should be undertaken in an attempt to identify instances in which, due to the advance of technology, banking procedures and practices, or both, the prior regulatory guidance is inappropriately restrictive.

Examples of regulatory interpretations to consider amending include:

- Broadening an interpretation allowing for the use of facsimile transmission or telephonic authorization or mailed authorization of wire transfer instructions to allow use of password secured websites for delivery of wire transfer authorizations.
- Broadening regulatory guidance that allows for submission of loan payments by mail or by deposit at an automated teller machine to include submission of loan payment instructions by electronic mail message confirming a charge against a customer deposit account for the payment, or by an instruction submitted via secure website.
- Broadening regulatory guidance that requires submission of investment objectives for directed trust accounts in writing by mail or facsimile to allow the account owner to (a) select an asset allocation scheme on a bank-sponsored website, or to (b) respond to a bank-generated electronic mail message requesting guidance on investment objectives.
- Broadening regulatory guidance that allows a state-chartered bank to provide bookkeeping services to homeowner associations to allow the bank to provide comprehensive data processing services, including bookkeeping services, to membership organizations requiring a variety of member-based bookkeeping and data intensive services.

## **C. Initial Regulatory Interpretations**

State banking departments may have promulgated regulations for which no interpretations have been drafted. Interpretation of regulations that cover topics including the (a) manner and mode of communications between a bank and its depositors or borrowers, (b) delivery of statements and other account information, (c) submission of loan application information, and (d) delivery of non-banking services (e.g., data processing, bookkeeping services, safekeeping services) should be reviewed to determine whether a reasoned interpretation could be drafted to expand the effective scope of allowable activities to include the

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either, independently promulgate a regulation with a maximum one year life, or submit his draft permanent regulation to the Office of Administrative Law for review and comment.

provision of such services and the operation of such activities through an internet/e-commerce format.

## **Tier 2 – Limited Amendment of Existing Statutes**

### **A. Limited Amendment of Existing Statutes**

Limited revisions of existing statutes may present an attractive alternative to some state banking departments with the ability to have the legislature approve minor adjustments to existing statutes. Examples of statutory amendments to evaluate include:

- To the extent that a state's parity statute is narrowly worded, and as written does not allow sufficient authority for the commissioner to find Subpart E as applicable to state-chartered banks, an effort should be undertaken to sufficiently broaden the statutory text to allow for such an interpretation.
- For statutory provisions that expressly authorize banks to (a) receive deposits by mail, (b) receive customer instructions regarding wire transfers and/or investment decisions by mail or facsimile, it may be desirable to amend those provisions to broaden the modes of communication by which that information may be communicated to the bank.
- Statutory provisions that allow a bank to provide safekeeping for valuable items could be broadened to allow a bank to act as a repository of confidential personal or business information such as data encryption keys, or electronic images of critical documents.
- Statutory provisions that allow a bank to operate its own data processing service could be broadened to allow the bank to "sell" the excess capacity in its system as well as to act as a third-party data processing servicer.
- Statutory provisions that require banks to (a) receive loan applications in writing in person, or (b) to open deposit accounts only in person in a branch of the bank could be amended to allow for such activities to be conducted electronically (e.g., completing the loan application on the bank's secure website), while providing appropriate safeguards for proper identification of the customer.

## **Tier 3 – Model Rule or Law**

The OCC's Subpart E was designed to incorporate prior interpretations on a wide range of electronic activities, and to provide simpler, clearer guidance to national banks engaging in electronic activities. Subpart E attempts to provide better guidance by combining the illustrative lists of activities previously approved by the OCC with several lists of factors that will be used by the OCC in identifying additional allowable activities.

The following section identifies the critical elements of a model that could be promulgated by the state bank commissioner or a law enacted by the state's legislature, based primarily on Subpart E.

NOTES:

1. Defined terms: The following generic terms are used throughout this draft of the model rule or law (model), whichever format would be most appropriate for the banking department to pursue, and should be replaced with terms that are appropriate for and consistent with the language used in each adopting state's statutory and regulatory materials:
  - a. <State>
  - b. <Commissioner>
  - c. <State-licensed>
2. Annotations: The following text of the model includes a number of annotations designed to highlight areas that require additional analysis by states considering adoption.

## **ELECTRONIC BANKING ACTIVITIES OF <STATE-LICENSED> BANKS**

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### **Exhibits**

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- F. - [Joint Guidance on Weblinking](#)

## **ELECTRONIC BANKING ACTIVITIES OF <STATE-LICENSED> BANKS**

### **1.0 SCOPE.**

This <Rule or Act> applies to a <State-licensed> bank's use of electronic technology to deliver services and products consistent with safety and soundness and consumer protection guidance and authorizes the issuance and identification of such supervisory guidance as may be deemed necessary and appropriate by the <Commissioner>. The supervisory guidance referred to above includes, at a minimum, all guidance previously issued by the <Commissioner> on any relevant issue pertaining to the use of technology to deliver services and products, the Interagency Guidelines Establishing Standards for Safeguarding Customer Information (Exhibits A.1. and A.2.), the FFIEC Guidance on Authentication in an Electronic Banking Environment (Exhibit B), the FFIEC Guidance on Risk Management of Outsourced Technology Services (Exhibit C), the FFIEC Information Technology Examination Handbook (Exhibit D with other modules forthcoming), the FFIEC Guidance on Control and Security Risks in Electronic Imaging Systems (SP-10) (Exhibit E), the Joint Guidance on Weblinking (Exhibit F), and any other supervisory guidance deemed necessary or appropriate by the <Commissioner>.

### **1.1 ELECTRONIC ACTIVITIES THAT ARE PART OF, OR INCIDENTAL TO, THE BUSINESS OF BANKING.**

**(a) Purpose.** This section identifies the criteria that the <Commissioner> shall use to determine whether an electronic activity is authorized as part of, or incidental to, the business of banking under existing statutory authority.

**(b) Restrictions and conditions on electronic activities.** The <Commissioner> may determine that activities are permissible for <State-licensed> banks under existing statutory authority only if they are subject to <State> and/or federal banking standards or conditions designed to provide that the activities function as intended and are conducted safely and soundly, in accordance with other applicable statutes, regulations, or supervisory policies.

**(c) Activities that are part of the business of banking.**

(1) An activity is authorized for <State-licensed> banks as part of the business of banking if the activity is described in existing statutory authority. In determining whether an electronic activity is part of the business of banking, the <Commissioner> shall consider the following factors:

- (iv) Whether the activity is the functional equivalent to, or a logical outgrowth of, a recognized banking activity;
- (v) Whether the activity strengthens the bank by benefiting its customers or its business;

- (vi) Whether the activity involves risks similar in nature to those already assumed by banks; and
- (vii) Whether the activity is authorized for national banks and federal savings associations.

**(d) Activities that are incidental to the business of banking.** (1) An electronic banking activity is authorized for a <State-licensed> bank as incidental to the business of banking if it is convenient or useful to an activity that is specifically authorized for <State-licensed> banks or to an activity that is otherwise part of the business of banking. In determining whether an activity is incidental to the business of banking, the <Commissioner> shall consider the following factors:

- (i) Whether the activity facilitates the production or delivery of a bank's products or services, enhances the bank's ability to sell or market its products or services, or improves the effectiveness or efficiency of the bank's operations, in light of risks presented, innovations, strategies, techniques and new technologies for producing and delivering financial products and services; and
- (ii) Whether the activity enables the bank to use capacity acquired for its banking operations or otherwise avoid economic loss or waste.

**(e) Scope and source of applicable guidance.** The scope of supervisory guidance to be addressed by a <State-licensed> bank that proposes to act under this Section includes, at a minimum, existing guidance for delivery of the specific activity, function, product or service via electronic means or otherwise previously issued by the <Commissioner>, the guidance in Exhibits A.1. , A.2., B, C, D, E, and F, and any other supervisory guidance as the <Commissioner> may deem necessary or appropriate.

## **1.2 FURNISHING OF PRODUCTS AND SERVICES BY ELECTRONIC MEANS AND FACILITIES.**

**(a) Board and Senior Management Responsibilities.** The <State-licensed> bank's board of directors and senior management are responsible for ensuring all potential risks (e.g. reputation, legal, compliance, and transaction (if applicable)) are evaluated and taken into account when implementing any electronic services. Their responsibility cannot be delegated to others within the institution or to outside parties.

**(b) Use of electronic means and facilities.** After its board of directors and senior management have conducted a thorough review of the potential risks and liabilities associated with any electronic services, a <State-licensed> bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service

that it is otherwise authorized to perform, provide, or deliver, subject to § 1.1(b) and <State> and federal guidance.

**[ANNOTATION: The following list of “permissible activities” is an example of activities previously approved by a <Commissioner>; adopting states should confirm that each such activity has in fact previously been approved by its <Commissioner>. ]**

**(c) Illustrative List of Permissible Activities.** The following list provides examples of activities previously identified by the <Commissioner> as permissible. This list is illustrative and not exclusive; the <Commissioner> may determine that additional activities are permissible pursuant to this authority.

(1) Acting as an electronic finder by:

**[ANNOTATION: The ability of a <State-licensed> bank to act as a finder under existing statutory authority should be confirmed.]**

- (i) Establishing, registering, and hosting commercially enabled web sites in the name of sellers of goods and/or services;
- (ii) Establishing hyperlinks between the bank’s site and a third-party site, including acting as a virtual mall by providing a collection of links to web sites of third-party vendors, organized by product type and made available to bank customers;
- (iii) Hosting an electronic marketplace on the bank’s Internet web site by providing links to the web sites of third-party buyers or sellers through the use of hypertext or other similar means;
- (iv) Hosting on the bank’s servers the Internet web site of:
  - (A) A buyer or seller that provides information concerning the hosted party and the products or services offered or sought and allows the submission of interest, bids, offers, orders and confirmations relating to such products or services; or
  - (B) A governmental entity that provides information concerning the services or benefits made available by the governmental entity, assists persons in completing applications to receive such services

or benefits and permits persons to transmit their applications for such services or benefits;

- (v) Operating an Internet web site that permits numerous buyers and sellers to exchange information concerning the products and services that they are willing to purchase or sell, locate potential counterparties for transactions, aggregate orders for goods or services with those made by other parties, and enter into transactions between themselves;
- (vi) Operating a telephone call center that provides permissible finder services;
- (vii) Providing electronic communications services relating to all aspects of transactions between buyers and sellers;
- (viii) Operating an Internet web site through which the bank acts as an electronic agent to negotiate transaction parameters on behalf of any interested party to a transaction, so long as the final transaction parameters are within the transaction parameters defined by the bank's principal; and
- (ix) Operating an Internet web site to accept transactions on behalf of any interested party to a transaction, where the interested parties to the transaction have agreed to all of the transaction parameters, and communicated their agreement to the bank.

(2) Providing electronic bill presentment services;

(3) Providing electronic aggregation of financial information for individuals and business entities;

(4) Offering electronic stored value systems; and

(5) Safekeeping through escrow, trust or other comparable means for personal information or valuable confidential trade or business information, such as encryption keys, computer source code or other data system information.

**(d) Applicability of guidance and requirements not affected.** When a <State-licensed> bank performs, provides, or delivers through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver, the electronic activity is subject to the safety and soundness and compliance regulatory requirements and supervisory guidance that the <Commissioner> would apply if the activity were conducted by non-electronic means or facilities. The <Commissioner> will endeavor to allow electronic methods of notice of the <State-chartered> bank performance, provision or delivery of such activities, functions, products



or services and to review other <State-chartered> bank requests that facilitate communication through electronic means.

(f) **Scope and source of applicable guidance.** The scope of supervisory guidance to be addressed by a <State-licensed> bank that proposes to act under this Section includes, at a minimum, existing guidance for delivery of the specific activity, function, product or service via electronic means or otherwise previously issued by the <Commissioner>, the guidance in Exhibits A.1. , A.2., B, C, D, E, and F, and any other supervisory guidance as the <Commissioner> may deem necessary or appropriate.

### **1.3 COMPOSITE AUTHORITY TO ENGAGE IN ELECTRONIC BANKING ACTIVITIES.**

Unless otherwise prohibited by State or federal law, a <State-licensed> bank may engage in an electronic activity that is comprised of several component activities if each of the component activities is itself part of or incidental to the business of banking or is otherwise permissible under State or law.

### **1.4 SALE OF EXCESS ELECTRONIC CAPACITY AND BY-PRODUCTS.**

(a) A <State-licensed> bank may, in order to optimize the use of the bank's resources or avoid economic loss or waste, market and sell to third parties electronic capacities acquired or developed by the bank for its banking business.

(b) With respect to acquired equipment or facilities, excess electronic capacity that may be sold to others can arise in a variety of situations, including the following:

(1) Due to the characteristics of the desired equipment or facilities available in the market, the capacity of the most practical optimal equipment or facilities available to meet the bank's requirements exceeds its present needs;

(2) The acquisition and retention of additional capacity, beyond present needs, reasonably may be necessary for planned future expansion or to meet the expected future banking needs during the useful life of the equipment;

(3) Requirements for capacity fluctuate because a bank engages in batch processing of banking transactions or because a bank must have capacity to meet peak period demand with the result that the bank has periods when its capacity is underutilized; and

(4) After the initial acquisition of capacity thought to be fully needed for banking operations, the bank experiences either a decline in level of the banking operations or an increase in the efficiency of the banking operations using that capacity.

(c) Types of electronic capacity in equipment or facilities that <State-licensed> banks may have acquired and that may be sold to third parties if excess to the bank's needs for banking purposes include:

- (1) Data processing services;
- (2) Production and distribution of non-financial software;
- (3) Providing periodic back-up call answering services;
- (4) Providing full Internet access;
- (5) Providing electronic security system support services; and
- (6) Electronic imaging and storage.

(d) Subject to applicable privacy, [confidentiality and contractual obligations, including at a minimum the guidance in Exhibit A.1., A.2. and C., and any other supervisory guidance deemed necessary or appropriate by the <Commissioner>](#), a <State-licensed> bank may sell to third parties electronic by-products legitimately acquired or developed by the bank for its banking business. Examples of electronic by-products that <State-licensed> banks may have legitimately acquired that may be sold to third parties if excess to the bank's needs include:

- (1) Software acquired (not merely licensed) or developed by the bank for banking purposes or to support its banking business; and
- (2) Electronic databases, records, or media (such as electronic images) developed by the bank for or during the performance of its permissible data processing activities.

## **1.5 STATE BANK ACTING AS DIGITAL CERTIFICATION AUTHORITY.**

(a) It is part of the business of banking for a <State-licensed> bank to act as a certificate authority and to issue digital certificates verifying the identity of persons associated with a particular public/private key pair. As part of this service, the bank may also maintain a listing or repository of public keys.

(b) A <State-licensed> bank may issue digital certificates verifying attributes in addition to the identity of persons associated with a particular public/private key pair where the attribute is one for which verification is part of or incidental to the business of banking. For example, <State-licensed> banks may issue digital certificates verifying certain financial attributes of a customer as of the current or a previous date, such as account balance as of a particular date, lines of credit as of a particular date, past financial

performance of the customer, and verification of customer relationship with the bank as of a particular date.

(c) When a <State-licensed> bank issues a digital certificate relating to financial capacity under this section, the bank shall include in that certificate an express disclaimer stating that the bank does not thereby promise or represent that funds will be available or will be advanced for any particular transaction.

(d) <State-licensed> banks that propose to commence activity under this Section shall do so only in compliance with existing supervisory guidance, including at a minimum, the guidance found in Exhibits A.1, A.2, B and C, and any other supervisory guidance deemed necessary or appropriate by the <Commissioner>.

## **1.6 DATA PROCESSING.**

**(a) Eligible activities.** It is part of the business of banking for a <State-licensed> bank to provide data processing, and data transmission services, facilities (including equipment, technology, and personnel), data bases, advice and third party access to such services, facilities, data bases and advice, for itself and for others, where the data is banking, financial, or economic data, and other types of data if the derivative or resultant product is banking, financial, or economic data. For this purpose, economic data includes anything of value in banking and financial decisions.

**(b) Other data.** A <State-licensed> bank also may perform the activities described in paragraph (a) of this section for itself and others with respect to additional types of data to the extent convenient or useful to provide the data processing services described in paragraph (a), including where reasonably necessary to conduct those activities on a competitive basis. The total revenue attributable to the bank's data processing activities under this section must be derived predominantly from processing the activities described in paragraph (a) of this section.

(c) **Scope and source of applicable guidance.** <State-licensed> banks that propose to commence activity under this Section shall do so only in compliance with existing supervisory guidance, including at a minimum, the guidance found in Exhibits A.1., A.2., C and D, and any other supervisory guidance deemed necessary or appropriate by the <Commissioner>.

**[ANNOTATION: The ability of a <State-licensed> bank to act as a correspondent under existing statutory authority should be confirmed. Furthermore, the ability of a <State-licensed> bank, authorized to act as a correspondent, to**

**take each of the listed activities should be confirmed.]**

### **1.7 CORRESPONDENT SERVICES.**

It is part of the business of banking for a <State-licensed> bank to offer as a correspondent service to any of its affiliates or to other financial institutions any service it may perform for itself. <State-licensed> banks that propose to offer correspondent services as authorized under this Section shall do so only in compliance with existing supervisory guidance, including at a minimum, the guidance found in Exhibits A.1., A.2, B, C, D, E, and F, and any other supervisory guidance deemed necessary or appropriate by the <Commissioner>. The following list provides examples of electronic activities that banks may offer correspondents under this authority. This list is illustrative and not exclusive; the <Commissioner> may determine that other activities are permissible pursuant to this authority.

- (a) The provision of computer networking packages and related hardware;
- (b) Data processing services;
- (c) The sale of software that performs data processing functions;
- (d) The development, operation, management, and marketing of products and processing services for transactions conducted at electronic terminal devices;
- (e) Item processing services and related software;
- (f) Document control and record keeping through the use of electronic imaging technology;
- (g) The provision of Internet merchant hosting services for resale to merchant customers;
- (h) The provision of communication support services through electronic means; and
- (i) Digital certification authority services.

### **1.8 LOCATION OF A STATE BANK CONDUCTING ELECTRONIC ACTIVITIES.**

The location of a <State-licensed> bank shall be the home office of the bank, as designated by the bank with the <Commissioner>. A <State-licensed> bank shall not be considered located in another state solely because it physically maintains technology,

such as a server or automated loan center, in that state, or because the bank's products or services are accessed through electronic means by customers located in that state.

## **1.9 WEB-LINKING AND SHARED ELECTRONIC SPACE.**

<State-licensed> banks that share electronic space or provide a link to an external website, including a co-branded web site, with a bank subsidiary, affiliate, or another third-party must take reasonable steps to clearly, conspicuously, and understandably distinguish between products and services offered by the bank and those offered by the bank's subsidiary, affiliate, or the third-party. Senior bank management should ensure that the institution's website is in full compliance with <State> and federal regulations and supervisory guidance.

## **1.10 BANKS OPERATING EXCLUSIVELY THROUGH THE INTERNET.**

**(a) Findings Required to Approve Application to Establish a <State-licensed> bank Intended to Operate Exclusively Through the Internet.** The <Commissioner>, in evaluating an application to form a new <State-licensed> bank seeking to operate exclusively through the Internet, must find favorably on each of the following factors, in addition to any other findings required pursuant to existing State law or regulation:

- (1) That the public convenience and advantage will be promoted by the establishment of the proposed <State-licensed> bank and its proposed delivery of services exclusively through the Internet.
- (2) That the application filed by the proposed <State-licensed> bank includes contingency and disaster recovery plans commensurate with the risks inherent in the operation of the bank, and specifically addressing the risks associated with the bank's operation exclusively through the Internet.
- (3) That the applicant has, or prior to commencement of operations will have, insurance coverage for losses arising from the operation of the bank exclusively through the Internet, or if self-insured, that the bank has sufficient excess capital and cash reserves to protect against the same types of potential losses.
- (4) That the proposed capital structure, and the proposed initial level of capital of not less than \$7.5 million, is adequate in light of the risks arising from delivering services exclusively through the Internet.

**(b) Contingency Measures.** This section shall not have the effect of revising or otherwise diminishing the obligations of a <State-licensed> bank under applicable State

or federal law, regulation or policy to develop and implement disaster recovery and contingency operating plans.

- (1) The Board of Directors of each <State-licensed> bank operating exclusively through the Internet shall cause management of the bank to prepare and annually review and update each of the following:
  - a) Contingency and disaster recovery plans commensurate with the risks inherent in the operation of the bank, specifically addressing the risks associated with the bank's operation exclusively through the Internet; and
  - b) Insurance coverage for losses arising from the operation of the bank exclusively through the Internet, or if self-insured, that the bank has sufficient excess capital and cash reserves to protect against the same types of potential losses;
- (2) The Board of Directors shall annually submit a certification of the review and adequacy of the matters described in sub-paragraph (1) above to the <Commissioner>.

**(c) Location of <State-licensed> bank Operating Exclusively Through The Internet.**

- (1) The home office of a <State-licensed> bank that operates exclusively through the Internet is the office identified by the bank to the <Commissioner> pursuant to <State> law and regulation.
- (2) A <State-licensed> bank operating exclusively through the Internet and delivering services, including fiduciary services, to customers located outside the State shall be located in the State of the home office of the bank, as designated by the bank to the <Commissioner>.

**(d) Information on System Structure.**

- (1) Each <State-licensed> bank operating exclusively through the Internet shall continually maintain documentation describing in detail the structure, systems, components and architecture of all of its computer systems, and shall make that complete set of documentation available to the <Commissioner> upon request.
- (2) Each <State-licensed> bank operating exclusively through the Internet shall annually provide the <Commissioner> with a summary description of all of its computer systems, said summary to include a certification that the bank has prepared the underlying, detailed documentation required under item (1) above.

(e) **Scope and source of applicable guidance.** The scope of supervisory guidance to be addressed by a <State-licensed> bank that proposes to act under this Section includes, at a minimum, existing guidance for delivery of the specific activity, function, product or service previously issued by the <Commissioner> and the federal banking regulators (see Exhibits A.1., A.2., B, D, and F) and any other supervisory guidance the <Commissioner> may deem necessary or appropriate.

## **1.11 ANTI-FRAUD PROVISIONS**

- (a) The <Commissioner> shall have the authority to take action, in coordination with foreign, federal, state and or local law enforcement agencies, to seize, or otherwise act to terminate the operation of, equipment, including servers, routers and other computer system components, existing within the State, and operated to host or otherwise sponsor or support fraudulent financial activities by any entity using in its name or on its website any of the terms “bank”, “savings and loan”, “thrift and loan” or “credit union”.

## **1.12 ELECTRONIC BOOKS AND RECORDS**

- (a) Every <State-licensed> bank shall keep its corporate records, financial records, and books of account in words and figures in a form satisfactory to the <Commissioner>, including such electronic formats as provide the bank with the ability to access, reproduce, and store for such retention periods as may be required by the bank under applicable local, state or federal law.